

STATE OF MICHIGAN
COURT OF APPEALS

In re JOHN W. AND LEONA M. WETZEL
REVOCABLE LIVING TRUST.

ALAN CLEVINGER,

Petitioner-Appellee,

v

MELISSA McCRORY,

Respondent-Appellant.

UNPUBLISHED
July 19, 2005

No. 254504
Jackson Probate Court
LC No. 00-000086-TV

Before: Fitzgerald, P.J., and Meter and Owens, JJ.

PER CURIAM.

Respondent appeals by right the probate court order removing respondent as joint successor trustee of her parents' joint trust. We affirm.

This case involves a dispute between siblings named as joint successor trustees of their parents' joint trust. Petitioner filed two petitions with the probate court where the trust was registered -- one to reopen the trust file and one to remove respondent as co-trustee -- after respondent transferred real estate from the joint trust to her mother's individual trust and then to her son and daughter-in-law without consideration. Respondent filed a motion to dismiss the petition for lack of jurisdiction, arguing that the probate court lacked jurisdiction to consider the petition, that petitioner failed to state a claim on which relief can be granted, and that the request was barred by the arbitration provision of the joint trust. The trial court denied respondent's motion to dismiss and granted the petition to remove respondent as joint successor trustee.

Respondent first asserts that the probate court lacked subject matter jurisdiction to consider the petition. Statutory interpretation and a determination whether subject matter jurisdiction exists are questions of law reviewed de novo on appeal. *In re Haque*, 237 Mich App 295, 299; 602 NW2d 622 (1999).

"Probate courts are courts of limited jurisdiction. Const 1963, art 6, § 15. The jurisdiction of the probate court is defined entirely by statute." *In re Wirsing*, 456 Mich 467, 472; 573 NW2d 51 (1998) (citation omitted). MCL 700.1302 states in relevant part:

The court has *exclusive legal and equitable jurisdiction* of all of the following:

(b) A proceeding that concerns the validity, internal affairs, or settlement of a trust; the administration, distribution, modification, reformation, or termination of a trust; or the declaration of rights that involve a trust, trustee, or trust beneficiary, including, but not limited to, *proceedings to do all of the following*:

(i) Appoint or *remove a trustee*. [Emphasis added.]

MCL 700.1103(j) specifically defines “court” as the probate court. Therefore, the plain language of MCL 700.1302(b) vests the probate court with subject matter jurisdiction over a broad category of trust-related matters, and MCL 700.1302(b)(i) specifically includes the removal of a trustee within this jurisdiction.¹

Respondent next asserts that the petition should have been dismissed because petitioner failed to state a claim upon which relief can be granted. A grant or denial of summary disposition based upon a failure to state a claim is reviewed de novo on appeal. *Adair v State*, 470 Mich 105, 119; 680 NW2d 386 (2004).

A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. *Mable Cleary Trust v Edward-Marlah Muzyl Trust*, 262 Mich App 485, 491; 686 NW2d 770 (2004). When considering motions brought under MCR 2.116(C)(8), courts must accept all well-pleaded factual allegations as true and construe them in a light most favorable to the non-moving parties. *Adair, supra* at 119; *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 508; 667 NW2d 379 (2003). The motion should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. *Adair, supra*.

Petitioner alleged in the petition that respondent was the joint successor trustee to her parents’ joint trust, which included several parcels of real estate. Respondent was also personal representative for her mother’s estate and trustee for her mother’s individual trust, both of which were executed after the formation of the joint trust. After her father and mother’s deaths, respondent, acting alone, transferred the same real estate previously conveyed to the joint trust to her mother’s individual trust. Respondent then conveyed the real estate to her son and daughter-in-law without consideration. Petitioner also alleged that respondent previously attempted to defraud the probate court concerning her mother’s estate by denying she had any siblings when questioned by the Deputy Probate Register. Petitioner alleged that respondent’s dishonesty

¹ Respondent’s argument that the Estates and Protected Individuals Code (EPIC), specifically MCL 700.7201(2), and MCR 5.501(B) provide that trusts should be “free from judicial intervention” is misplaced. Both the statute and court rule state that such freedom from court intervention is subject to court jurisdiction being invoked by an interested party.

rendered respondent “unable to perform fiduciary duties without engaging in self-dealing.” Viewed in a light most favorable to petitioner, the factual allegations in the petition demonstrate both a conflict of interest and a lack of fiduciary capacity. The trial court properly denied respondent’s motion to dismiss for failure to state a claim upon which relief can be granted.

Finally, respondent asserts that the probate court erred in determining that the joint trust agreement does not mandate arbitration over the removal of a trustee. Whether contract language is ambiguous, as well as the proper interpretation of a contract, are questions of law that we review de novo. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003).

At issue in this case is Section 7.01 of the joint trust agreement, which provides in relevant part:

Any controversy between the Trustee or Trustees and any other Trustee or Trustees, or between any other parties to this Trust, including Beneficiaries, involving the construction or application of any of the terms, provisions, or conditions of this Trust shall, on the written request of either or any disagreeing party served on the other or others, be submitted to arbitration. ...

A review of the trust agreement reveals no term or provision addressing the removal of a trustee. Consequently, the petition to remove respondent as joint successor trustee does not involve a “controversy . . . involving the construction or application of any of the terms, provisions, or conditions of this Trust” subject to arbitration.²

² During the oral argument on this matter respondent asserted that she was not afforded a hearing in this matter. The lower court record contains notices of hearing regarding petitioner’s petitions as well as of respondent’s motion to dismiss. However, no transcript of a hearing is included in the record. In its opinion and order, however, the trial court states:

This matter was brought before this Court on a Petition to Reopen Trust and for Removal of Joint Successor Trustee filed by Alan Clevenger, by his attorneys Diane Rappleye and Julius Hoffman. A motion to dismiss was filed by Melissa McCrory by her attorney Dennis Conant, *arguments were heard in open Court and Briefs were filed by each party* (emphasis added).

The record also contains a “Certificate of No Transcript” filed by respondent’s attorney that states that “there is no record to be transcribed.” The lower court record is therefore ambiguous with regard to whether a hearing was held. Assuming that a hearing was not held, respondent clearly was aware of this fact before filing her brief on appeal, but chose not to raise the issue in her brief. Respondent has therefore failed to properly present this issue and we decline to address it. *People v Jones (On Rehearing)*, 201 Mich App 449, 456-457; 506 NW2d 542 (1993).

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Patrick M. Meter

/s/ Donald S. Owens